



DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary
Office of the General Counsel
Public Health Division

Title I issue - Giving full
calculation and in one fiscal
year

file 1995

November 7, 1995

NOTE TO WANDA CORNELIUS

Re: Date Certain for Lump-Sum Payments for Title I Contracts

Introduction

You have faxed to me a copy of proposed language for the Seneca Nation Title I Annual Funding Agreement (AFA). The current proposed language states:

The Indian Health Service shall provide the Seneca Nation the amount of \$5,713,671.00 in one annual lump sum in accordance with Article II, section 6 of the Contract. The payment shall be made not later than ten calendar days after the date on which the Office of Management and Budget apportions the appropriation for the fiscal year for the program, services, functions and activities subject to the Contract. During any period of contract performance covered by joint resolution adopted by Congress continuing funding shall be provided to the Seneca Nation by the Indian Health Service to the extent permitted by such resolution.

Language submitted to the Nashville Area Office, November 7, 1995. This language would require a lump-sum payment within ten days of apportionment. It has been the experience of the Indian Health Service (IHS) that this is not practically achievable. Consequently, I would recommend that you do not agree to this language. However, you could agree to alternative language. In this note I will first discuss the Model Contract provisions and then an AFA clause for a date certain for the lump sum payment.

Model Contract and AFA

As you are aware, Pub. L. 103-413, extensively amended Title I of Pub. L. 93-638. One amendment was the addition of Section § 108, the Model contract, 25 U.S.C. § 4501. In this section, the law requires that "all self-determination contracts enter into under this Act shall --

- (1) contain, or incorporate by reference, the provisions of the model agreement described in subsection (c) (with modifications where indicated and the blanks appropriately filled in), and
- (2) contain such other provisions as are agreed to by the parties."

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Id. § 108(a), 25 U.S.C. § 450l(a). Thus, according to the amended statute, all self-determination contracts must incorporate all provisions of the Model agreement.¹ Besides the required, statutory provisions, the law allows additional provisions as "are agreed to by the parties." We interpret this language to allow additional provisions if both parties agree to those provisions. Consequently, a tribe may propose additional language for the contract but that language can only be added if the IHS representatives at the table agree.

The Model Contract also states the requirements for the AFA. Section (f)(2) of the Model Contract states:

(2) ANNUAL FUNDING AGREEMENT.--

(A) IN GENERAL.--The annual funding agreement under this Contract shall only contain--

(i) terms that identify the programs, services, functions, and activities to be performed or administered, the general budget category assigned, the funds to be provided, and the time and method of payment; and

(ii) such other provisions, including a brief description of the programs, services, functions, and activities to be performed (including those supported by financial resources other than those provided by the Secretary), to which the parties agree.

§ 108(c), section 1(f)(2) (emphasis added.)

Under the terms of the Model Contract, the AFA shall only contain those provisions listed in (i) and (ii) in section (f)(2). Section (f)(2)(i) does state that the AFA contain terms that identify the "time and method" of payment. However, the statutory provisions do not state a specified time for payment. Therefore, the exact timing of payment is subject to negotiation and agreement of the parties.

In your E-mail you state that the Seneca Nation is insisting on language which specifies that payment will be made within 10 days of apportionment. The Model Contract addresses

¹. Some questions have been asked whether modifications can be made to the statutory Model Agreement language. It is our opinion that minor, non-substantive, additions can be made, but that all contracts must include all provisions of the statutory Model Contract.

payment in § 108, section 1(b)(6). This section states:

- (A) IN GENERAL.--Payments to the Contractor under this Contract shall--
- (i) be made as expeditiously as practicable; and
 - (ii) include financial arrangements to cover funding during periods covered by joint resolutions adopted by Congress making continuing appropriations, to the extent permitted by such resolutions.

Id. This is the only section in the Model Contract that addresses timing of payments and this section only requires that payment be made "as expeditiously as practicable."² Although the model provision for the AFA does require that the AFA contain a provision which addresses the timing and method of payment, it does not require a specific time frame for payment. Therefore, the IHS is under no obligation to make the lump-sum payment within 10 days of apportionment. Moreover, § 105(b), which was not repealed by Pub. L. 103-413, authorizes the Secretary to make payments "in such installments and on such conditions as the appropriate Secretary deems necessary to carry out the purposes of this title." Id. Thus, I think that the IHS has broad authority to negotiate the timing of the lump-sum payment.

The timing of the lump-sum payment is important because the Model Contract provides that the Prompt Payment Act applies. See, section 1(b)(6)(B)(iii). The Prompt Payment Act provides that the United States must pay interest charges "beginning on the day after the required payment is due and ending on the date payment is made." 31 U.S.C. § 3902(a).³ In addition, the FAR clauses which provide for a grace period or further define the payment due date also do not apply to Title I contracts. See § 105(a). Consequently, whatever date the agency agrees to make the payment, interest will start to accrue on that date.

Proposed Language

The Model Contract requires that the AFA state the "time and method" of payment.

². Section 1(b)(6)(B)(ii) discusses the method of quarterly payments. This section only applies when the tribe or tribal organization chooses to receive quarterly payments. If the tribe is receiving quarterly payments and one quarter's payment falls on the first day of the fiscal year, then that payment is due within 10 days of apportionment. This language has no applicability to lump-sum payments.

³. 31 U.S.C. § 3907 provides that interest does not continue to accrue once a claim is filed under the Contract Disputes Act or for more than one year. However, if a claim is filed under the Contract Disputes Act, then interest can be awarded under that statute.

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However, it must be a payment date which the agency knows that it can meet since the interest penalty begins to accrue on the date payment is due under the contract. It has been my understanding that the IHS, in the context of Title III where the Prompt Payment Act does not apply, has been unable to provide payment within 10 days of apportionment. Since the Model Contract provision for the AFA does not state specifically the timing of payment, then I would suggest that you negotiate a clause which you believe the IHS can reasonably meet. (This position is supported by § 105(b), see discussion above.) Thus, I do not think that any time less than 30 days after apportionment is reasonable. Therefore, I suggest the following alternative language:

The Indian Health Service shall provide the Seneca Nation the amount of [insert amount] in one annual lump sum in accordance with [cite the equivalent of the Model Provision 1(b)(6)]. The payment shall be made not later than [insert reasonable date I suggest no less than 30 days, but 45 is probably more reasonable] calendar days after the date on which the Office of Management and Budget apportions the appropriation for the fiscal year for the program, services, functions and activities subject to the Contract.

I have eliminated the last sentence as redundant since the Model Contract provision, 1(b)(6)(A)(ii) deals with the continuing resolution issues and this section cites section 1(b)(6).

Finally, you have asked about the amount of the lump-sum payment. The Seneca Nation has request that the full amount of the contract be awarded in a lump-sum though part of the funding is FY-97 funds. The IHS legally cannot award FY-97 funds before the time those funds are appropriated. Section 106(b)(5) specifically states that funds awarded under Title I contracts are subject to the availability of appropriations. Since FY-97 funds have not been appropriated, then the IHS cannot award funds subject to that appropriation.

If you have any additional questions or concerns, please do not hesitate to call me on (301) 443-0405.


Edith R. Blackwell

cc: Richard Price
Archie Clifford